Supreme Court, U.S.
FILED
MAY 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL MILL SERVICE,

and

THOMAS VAN DEN HANDEL,

Petitioners,

vs.

JAMES AUBUSCHON,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

JOHN J. HOPKINS
Counsel of Record
HOPKINS & BILBREY, P.C.
1412 20th Street
P.O. Box 731
Granite City, Illinois 62040
(618) 452-1092

Attorneys for Respondent

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Reason Why Writ Should Be Denied	1-5
Conclusion	5

TABLE OF AUTHORITIES

Page

Cases:

Krasinski v. United Parcel Service, 124 Ill.2d 483, 530 N.E.2d 468 (1988) 1,2,3

Lingle v. Norge Division, Magic Chef, 486 U.S. ____, 100 L.Ed.2d 410 (1988) 2,3

Mays v. Reynolds Company, ____ U.S. ____, 108 S.Ct. 2814, 100 L.Ed. 915 (1988) 2,3

Mays v. Reynolds Company, 516 So.2d 517, (Ala. 1987) 2

Zeinfeld v. Hayes Freight Lines, Inc., 41 Ill.2d 345, 243 N.E.3d 217 (Ill. 1968) 4

No. 88-1479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL MILL SERVICE,

and

THOMAS VAN DEN HANDEL,

Petitioners,

vs.

JAMES AUBUSCHON,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

REASONS WHY WRIT SHOULD BE DENIED

I. With the facts herein presented, the law is well settled to deny Petitioner the defense of Federal preemption.

The Illinois Supreme Court, in an Order published at 530 N.E.2d 976 (1989), denied the Petitioners' attempt to use the preemption doctrine to block the Respondent's day in Court. (Petitioners' Appendix A-1). In reversing the Fifth District Appellate Court's decision, the Illinois Supreme Court specifically found its prior decision in *Krasinski v. United Parcel Service*,

124 Ill.2d 483, 530 N.E.2d 468 (1988) to be the controlling principle of law. The Illinois Supreme Court, in deciding *Krasinski*, looked both to this Court's decision in *Lingle v. Norge Division of Magic Chef*, 486 U.S. ____, 100 L.Ed.2d 410 (1988), as well as a subsequent decision applying *Lingle*, that being *Mays v. Reynolds Company*, ____ U.S. ____, 108 S.Ct. 2814, 100 L.Ed. 915 (1988).

In *Mays*, as in the case at bar, the Plaintiff filed a State Court action for defamation arising out of the publication of a Notice of Discharge. The Defendant employer claimed a defense of preemption and in a decision found at 516 So.2d 517, (Ala. 1987), the Alabama Supreme Court upheld the preemption defense and barred the aggrieved employee from the Courthouse door. The employee then filed his Petition for Writ of Certiorari.

In a memorandum decision, the Petition for Writ of Certiorari was granted, the Alabama Supreme Court's decision summarily vacated, and the case sent back for further considerations in light of the *Lingle* decision with expectations that the decision would be reversed outright with, at the very least, the matter being sent back for a jury trial on the merits.

Unquestionably, the trilogy of decisions, *Lingle, Mays,* and *Krasinski* stand in opposition to the blanket application of the preemption doctrine so proposed by the Petitioner. As set forth in some detail in all three cases, the essence of the claim — the breach of the Defendant's duty towards the Plaintiff — finds its root in State common law, and not in the Union Contract. As such, as in *Lingle, Krasinski, Mays*, and now *Aubuschon*, the preemption doctrine is and was wholly inapplicable. The factual similarities between *Mays* and *Aubuschon* are obvious and apparent. The applicability of the preemption defense in a libel case based on malicious falsehoods in the Notice of Discipline has been clearly decided in the negative. Petitioners present no new factual situations, only a repeat of facts and questions of

law previously decided. This is a settled area of law, where, despite the Petitioners' attempts to draw distinctions without differences, no true conflict exists. As the supreme national forum, this Honorable Court takes great pains to be judicious in the selection of its docket. It would surely be a waste of the Court's precious time, and in the process infringe upon the rights of the parties legitimately before the Court, to perpetuate debate on such a predetermined point of law, a debate which serves no purpose save to fill the pockets of corporate lawyers inveighing against the inevitable. Such a pointless waste cannot and must not be allowed.

Since *Lingle, Mays,* and *Krasinski* are clearly controlling, there exists no just reason for the Court to grant a Writ of Certiorari. Therefore, the Petitioners' Writ of Certiorari should be denied.

II. The immunity from suit sought by Petitioners should be rejected by this Honorable Court.

The Petitioners seek a grant of total immunity to employers from defamation suits by employees if any part of the statement, its required publication, or evidentiary proof of its truth or falsity are in any way dependant upon the terms and conditions of a collective bargaining agreement. Immunity from suit breeds contempt for the rights of workers; immunity from suit breeds contempt for the collective bargaining process; immunity from suit breeds contempt for the rule of law, and a distrust of the entire legal system. The collective bargaining agreement machinery simply cannot cope with actions for defamation, and to immunize the Petitioners in this context would promote a carelessness that would know no bounds. The harms alleged by the Respondent in his suit for malicious defamation are capable of remedy only outside the scope of a collective bargaining agreement; preemption by Federal labor law is clearly inappropriate. The Respondent's suit is for malicious defamation, a basic and fundamental right to be protected by appropriate

judicial process, not abandoned to the imprecise and capricious confines of arbitration. The Petitioners have myopically focused on the collective bargaining agreement itself, and the mandatory requirement of publication of grievance notices and responses. What has been conveniently overlooked is the content of the grievance memorandum, and the false and defamatory statement contained therein. Aubuschon's case is not a case for replevin of missing tools; it is not an action for breach of contract to supply replacement tools; it is and remains an action for malicious libel brought about by defamatory statements contained in a memorandum attached to a notice of grievance proceedings. The mere fact that publication was required by the collective bargaining agreement is of and in itself irrelevant, as publication is but one element of Respondent's case. The fact that publication was mandated and not discretionary does not and cannot permit the employer total immunity from defamation of character. If the matters contained in any memorandum are legitimately part of the grievance process and made in good faith and not with malice, then privileges would attach that would deny Respondent's claim. The Respondent complains not only because of the publication of the memorandum, but because of the false and malicious material contained therein. The Respondent's claim is for defamation brought about by the malicious and reckless conduct of the Petitioners. The dangers of the requirement of publication in the collective bargaining agreement are neutralized by the conditional privilege for common business interests. However, as this Court is well aware, this privilege is *lost* upon a showing of malice or an absence of good faith. *Zeinfeld v. Hayes Freight Lines, Inc.*, 41 Ill. 2d 345, 243 N.E.2d 217 (Ill. 1968). If *Aubuschon* is reversed, in addition to the substantial protection granted by the conditional privileges, the Petitioners would now be totally immunized from suit, only to be restrained by their own elements of conscience. As past history sorely teaches, corporate self-restraint is but an illusory form of protection; it would be woefully inadequate.

All citizens have a basic and fundamental right to be free from defamatory statements, maliciously made and intentionally published. James Aubuschon nor any other union member should be held to have abandoned this right as terms and conditions of a collective bargaining agreement. The substantial and long-standing rights of all citizens to be free from malicious defamation cannot and must not be sacrificed at the altar of efficient industrial relations. This Court is most respectfully urged to deny the Petition for Writ of Certiorari and let stand the decision of the Supreme Court of Illinois.

CONCLUSION

For the reasons set forth herein, the Respondent, James Aubuschon, respectfully requests that said Petition for Writ of Certiorari should be denied.

Respectfully submitted,

John J. Hopkins
Counsel of Record

Hopkins & Bilbrey, P.C.
1412 20th Street; P.O. Box 731
Granite City, Illinois 62040
(618) 452-1092

Attorney for Respondent